

JPP

3:01-CV-1660 CMTM INC V. CALLIOPE MEDIA

1

CMP

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CMTM, Inc.

FILED
01 SEP 13 PM 2:03
Clerk of the District Court
BY: *[Signature]* CLERK

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

'01 CV 1660 B (AJB)

CMTM, INC., a California
Corporation,

Plaintiff,

vs.

CALLIOPE MEDIA, LLC, a California
Limited Liability Company and DOES
1 through 10; inclusive,

Defendant(s).

CASE NO.:

COMPLAINT FOR TRADEMARK
INFRINGEMENT; VIOLATIONS OF
LANHAM ACT; UNFAIR COMPETITION;
CONSTRUCTIVE TRUST and
ACCOUNTING

DEMAND FOR JURY TRIAL

I

PLAINTIFF'S COMPLAINT

As for claims for relief against defendant, plaintiff, CMTM,
INC., alleges as follows:

II

JURISDICTION AND VENUE

1. This court has jurisdiction under 15 USC § 1125(a) in that

1 this case arises under the Trademark Laws of the United States, 15
2 USC §§ 1051 et seq.

3 2. The court has jurisdiction of the unfair competition claims
4 herein under the provisions of 28 USC § 1338(b) in that such claims
5 are joined with a substantial and related claim under the Trademark
6 Laws of the United States, 15 USC §§ 1051 et seq.

7 3. Venue is proper in this Court pursuant to 28 U.S.C. §
8 1391(c). Defendant is subject to personal jurisdiction due to its
9 minimum contacts and thus, defendant resides in this district.

10 III

11 THE PARTIES

12 4. Plaintiff, CMTM, INC., ("CMTM"), is a corporation
13 incorporated under the laws of the State of California having its
14 principle place of business at 7979 Ivanhoe Street, Suite 100, La
15 Jolla, CA 92037.

16 5. Upon information and belief, defendant, CALLIOPE MEDIA, LLC,
17 ("CALLIOPE"), is a limited liability company organized under the
18 laws of the State of California having its principle place of
19 business at 5107 Cass Street, San Diego, CA 92109.

20 IV

21 BACKGROUND FACTS AND GENERAL ALLEGATIONS

22 6. Plaintiff incorporates by reference paragraphs 1-5,
23 inclusive, as if fully set forth here.

24 7. On or about April 4, 2001, CMTM adopted the mark "AN
25 ATTORNEY NEAR YOU" and has used it in interstate commerce to
26 identify its services ever since. On April 25, 2001, CMTM filed an
27 application for registration of such mark in the United States
28 Patent and Trademark Office. This application is identified as

1 Serial No.: 76/246087.

2 8. CMTM has used the above-described mark to identify its
3 services and to distinguish them from those made and sold by others,
4 by, among other things, prominently displaying the mark on its
5 website, and on marketing materials, packets and literature
6 associated therewith. In addition, CMTM has prominently displayed
7 the mark on bills, direct mail advertising, and in periodicals
8 distributed throughout the United States.

9 9. On or about August 13, 2001, CMTM discovered that CALLIOPE
10 was using the following names to identify its products/services:

- 11 ☐ An Attorney For You
- 12 ☐ A Medical Malpractice Attorney For You
- 13 ☐ A Personal Injury Attorney For You
- 14 ☐ A Toxic Mold Attorney For You
- 15 ☐ A Baycol Attorney For You

16 CMTM has further learned of actual confusion in the
17 marketplace. Several of CMTM's vendors, prospective clients and
18 prospective partners have expressed confusion between CMTM's mark
19 and the above names that CALLIOPE is using.

20 10. Corporate representatives from CMTM and CALLIOPE have
21 discussed the issues of confusion and infringement without
22 resolution. CALLIOPE has refused to drop the above identifiers and
23 continues to use them to this day.

24 11. From the inception, CALLIOPE's conduct has been willful and
25 deliberate, and justifies an award based on three times CALLIOPE's
26 profits.

27 12. CALLIOPE has also copied large portions of CMTM's website
28 without authorization or concession from CMTM.

V

FIRST CAUSE OF ACTION

(Trademark Infringement)

13. Plaintiff incorporates by reference paragraphs 1-12, inclusive, as if fully set forth here.

14. Upon information and belief, defendant has infringed plaintiff's mark in interstate commerce by various acts, including selling, offering for sale and advertising products/services displaying the following identifiers:

- ☐ A Medical Malpractice Attorney For You
- ☐ A Personal Injury Attorney For You
- ☐ A Toxic Mold Attorney For You
- ☐ A Baycol Attorney For You

The use of such names by defendant is without permission or authority of plaintiff and is likely to cause confusion, to cause mistake, and to deceive.

15. Defendant's alleged acts of trademark infringement and unfair competition have been committed with the intent to cause confusion and mistake and to deceive.

16. Since on or about August 15, 2001, plaintiff has given notice that its mark was being unlawfully used by defendant. Plaintiff has requested defendant to cease and desist from its acts of trademark infringement.

VI

SECOND CAUSE OF ACTION

(Violation of Lanham Act by Use of False Designation in Interstate Commerce)

17. Plaintiff incorporates by reference paragraphs 1-16,

1 inclusive, as if fully set forth here.

2 18. Defendant is offering and providing services within
3 interstate commerce with the designation and representation of the
4 above-identified names connected therewith. Defendant's use of these
5 names is a false description and representation that such services
6 are offered by, sponsored by or affiliated with plaintiff.
7 Defendant's acts are in violation of 15 USC § 1125(a), in that
8 defendant has used in connection with goods and services a false
9 designation of origin and a false description or representation,
10 including words and other symbols tending falsely to describe or
11 represent the same, and has caused such products/services to enter
12 into interstate commerce. Plaintiff believes that it is likely to be
13 damaged by such false description and representation by reason of
14 the likelihood that customers will be confused as to the true
15 source, sponsorship or affiliation of defendant's products/services.

16 19. By reason of defendant's acts alleged herein, plaintiff has
17 suffered, and will continue to suffer, damage to its business,
18 reputation, and good will and has lost sales and profits that
19 plaintiff would have realized but for defendant's acts.

20 VII

21 THIRD CAUSE OF ACTION

22 **[Unfair Competition - California Bus. & Prof. Code § 17200 et seq.]**

23 20. Plaintiff incorporates by reference paragraphs 1-19,
24 inclusive, as if fully set forth here.

25 21. The acts and conduct of defendant as alleged above in this
26 Complaint constitute unfair competition as defined by California
27 Bus. & Prof. Code § 17200 et seq.

1 22. The acts and conduct of defendant is likely to cause
2 confusion and mistake among customers, end users and the public as
3 to the origin or association of defendant's services. The acts and
4 conduct of defendant is likely to lead the public to conclude,
5 incorrectly, that the services offered, advertised, and marketed by
6 defendant originate with, are sponsored by, or are authorized by
7 plaintiff, to the damage and harm of plaintiff, its licensees, and
8 the public.

9 23. As a result, defendant should be required to disgorge any
10 profit or gain that it obtained as a result of its wrongful
11 activity.

12 VIII

13 FOURTH CAUSE OF ACTION

14 [For Imposition Of A Constructive Trust Upon Illegal Profits]

15 24. Plaintiff incorporates by reference paragraphs 1-22,
16 inclusive, as if fully set forth here.

17 25. By reason of the acts and conduct set forth herein, defendant
18 has engaged and is engaging in deceptive, fraudulent and wrongful
19 conduct in the nature of passing off its products and services as
20 genuine products and services of plaintiff and/or products and
21 services sponsored or approved by plaintiff. Plaintiff believes that
22 defendant maintains the illegal profits from its actions, all of
23 which belong to plaintiff.

24 26. By virtue of its wrongful conduct, defendant holds illegal
25 profits as constructive trustee for the benefit of plaintiff.

26 27. Plaintiff is not presently aware of where defendant has
27 deposited all of their illegal profits. Plaintiff believes that
28 defendant's illegal profits, whether in the form of bank accounts or

1 in the form of real or personal property, will eventually be traced.
2 Plaintiff therefore believes that defendant holds such illegal
3 profits as constructive trustee for the benefit of plaintiff.

4 **IX**

5 **FIFTH CAUSE OF ACTION**

6 **[Accounting]**

7 28. Plaintiff incorporates by reference paragraphs 1-27,
8 inclusive, as if fully set forth here.

9 29. Plaintiff is entitled pursuant to 15 U.S.C. § 1117 to recover
10 any profits of defendant that are attributable to its acts of
11 infringement.

12 30. The amount of money due from defendant to plaintiff is
13 unknown to plaintiff and cannot be ascertained without an accounting
14 of the infringing products and services offered by defendant.

15
16 **WHEREFORE**, plaintiff demands that:

17 1. This Court grant a preliminary and permanent injunction
18 pursuant to the powers granted it under 15 USC § 1116, enjoining
19 defendant and its agents, servants, and employees from directly or
20 indirectly using the names, *A Medical Malpractice Attorney For You*,
21 *A Personal Injury Attorney For You*, *A Toxic Mold Attorney For You*, *A*
22 *Baycol Attorney For You*, or any mark, word, or name similar to
23 plaintiff's marks which is likely to cause confusion or mistake or
24 to deceive;

25 2. This court, pursuant to the power granted it under 15 USC §
26 1118, order that all labels, signs, prints, packages, wrappers,
27 receptacles, and advertisements in the possession of defendant
28 bearing the above marks, and all plates, molds, and other means of

making the same shall be delivered up and destroyed;

3. Defendant be required to account to plaintiff for any and all profits derived by defendant from the sale of its products/services and for all damages sustained by plaintiff by reason of the acts of infringement and unfair competition complained of herein;

4. The court award plaintiff treble the amount of actual damages suffered by plaintiff, pursuant to 15 USC § 1117;

5. Costs of this action be awarded plaintiff;

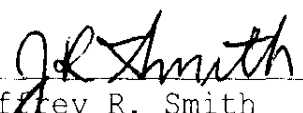
6. Plaintiff be awarded its reasonable attorneys' fees;

7. Plaintiff be awarded its prejudgment interest; and

8. The court grant such other and further relief as it shall deem just.

Dated: September 12, 2001

SMITH & BROWN, LLP


Jeffrey R. Smith
Attorneys for Plaintiff,
CMTM, INC.


JURY DEMAND

Plaintiff hereby demands trial by jury on all issues triable to a jury.

Dated: September 12, 2001

Respectfully submitted,

SMITH & BROWN, LLP


Jeffrey R. Smith
Attorneys for Plaintiff,
CMTM, INC.

TO: Commissioner of Patents and Trademarks Washington, D.C. 20231	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT
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In compliance with the Act of July 19, 1952 (66 Stat. 814; 35 U.S.C. 290) you are hereby advised
that a court action has been filed on the following patent(s) in the U.S. District Court:

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
01-CV-1660 B(AJB)	9-13-01	United States District Court, Southern District of California
PLAINTIFF		DEFENDANT
CMTM, Inc.		Calliope Media, LLC
PATENT NO.	DATE OF PATENT	PATENTEE
1 see complaint (enclosed)	see complaint	CMTM, Inc.
2		
3		
4		
5		

In the above-entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY			
	<input type="checkbox"/> Amendment	<input type="checkbox"/> Answer	<input type="checkbox"/> Cross Bill	<input type="checkbox"/> Other Pleading
PATENT NO.	DATE OF PATENT	PATENTEE		
1				
2				
3				
4				
5				

In the above-entitled case, the following decision has been rendered or judgment issued:

DECISION/JUDGMENT		
CLERK	(BY) DEPUTY CLERK	DATE

Copy 1 - Upon initiation of action, mail this copy to Commissioner Copy 3 - Upon termination of action, mail this copy to Commissioner
Copy 2 - Upon filing document adding patent(s), mail this copy to Commissioner Copy 4 - Case file copy

TO: Commissioner of Patents and Trademarks Washington, D.C. 20231	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT
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PLAINTIFF CMTM, Inc.		DEFENDANT Calliope Media, LLC
PATENT NO.	DATE OF PATENT	PATENTEE
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PATENT NO.	DATE OF PATENT	PATENTEE
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The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Federal Rules of Civil Procedure or by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

CMTM, INC.

DEFENDANTS

CALLIOPE MEDIA, LLC

01 SEP 13 PM 2:05

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

BY:

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Jeffrey R. Smith
SMITH & BROWN, LLP
2247 San Diego Ave., Suite 234
San Diego, CA 92110
(619) 260-2444

ATTORNEYS (IF KNOWN)

01 CV 1660 B (AJB)

IN BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- U.S. Government Plaintiff • ☒ Federal Question
(U.S. Government Not a Party)
- U.S. Government Defendant • ☐ Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PI	DEF		PI	DEF
Citizen of This State	• 1 •	• 1 •	Incorporated or Principal Place of Business in This State	• 4 •	• 4 •
Citizen of Another State	• 2 •	• 2 •	Incorporated and Principal Place of Business in Another State	• 5 •	• 5 •
Citizen or Subject of a Foreign Country	• 3 •	• 3 •	Foreign Nation	• 6 •	• 6 •

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

Trademark Infringement, 15 USC §1125(a)

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<ul style="list-style-type: none"> 110 Insurance 120 Marine 130 Miller Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 151 Medicare Act 152 Recovery of Defaulted Student Loans (Excl. Veterans) 153 Recovery of Overpayment of Veterans Benefits 160 Stockholders Suits 180 Other Contract 195 Contract Product Liability 	PERSONAL INJURY <ul style="list-style-type: none"> 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 	PERSONAL INJURY <ul style="list-style-type: none"> 362 Personal Injury: Medical Malpractice 365 Personal Injury - Product Liability 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <ul style="list-style-type: none"> 370 Other Fraud 371 Youth in Ending 380 Other Personal Property Damage 385 Property Damage: Product Liability 	<ul style="list-style-type: none"> 610 Agriculture 620 Other Food & Drug 625 Drug Related Seizure of Property 21 USC881 630 Liquor Laws 640 RR & Truck 650 Airline Regs 660 Occupational Safety/Health 680 Other 	<ul style="list-style-type: none"> 422 Appeal 28 USC 158 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <ul style="list-style-type: none"> 820 Copyrights 830 Patent 840 Trademark SOCIAL SECURITY <ul style="list-style-type: none"> 861 SSA (1958) 862 Black Lung (923) 863 DIWC-DIWW (405g) 864 SSD Title XVI 865 RSI (405g) FEDERAL TAX SUITS <ul style="list-style-type: none"> 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS - Third Party 26 USC 7609 	<ul style="list-style-type: none"> 400 State Reapportionment 410 Antitrust 440 Banks and Banking 450 Commerce/ICC Rates/etc 460 Deportation 470 Racketeer Influenced and Corrupt Organizations 810 Selective Service 850 Securities/Commodities Exchange 875 Customer Challenge 12 USC 891 Agricultural Acts 892 Economic Stabilization Act 893 Environmental Matters 894 Energy Allocation Act 895 Freedom of Information Act 900 Appeal of Fee Determination Under Equal Access to Justice 980 Constitutionality of State 890 Other Statutory Actions
REAL PROPERTY <ul style="list-style-type: none"> 210 Land Condemnation 220 Eminent Domain 230 Rent Lease & Ejectment 240 Ten to Land 245 Tort Product Liability 290 All Other Real Property 	CIVIL RIGHTS <ul style="list-style-type: none"> 441 Voting 442 Employment 443 Housing/Accommodations 444 Welfare 440 Other Civil Rights 	PRISONER PETITIONS <ul style="list-style-type: none"> 510 Motions to Vacate Sentence Habeas Corpus 530 General 535 Death Penalty 540 Mandamus & Other 550 Civil Rights 553 Prisoner Conditions 	<ul style="list-style-type: none"> 710 Fair Labor Standards Act 720 Labor/Mgmt. Relations 730 Labor/Mgmt. Reporting & Disclosure Act 740 Railway Labor Act 790 Other Labor Litigation 791 Emp. Ret. Inc. Security Act 		

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ Original Proceeding • 2 Removal from State Court • 3 Remanded from Appellate Court • 4 Reinstated or Reopened • 5 Transferred from another district (specify) • 6 Multidistrict Litigation • 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

• CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

\$300,000

Check YES only if demanded in complaint:

JURY DEMAND: ☒ YES • NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

Docket Number

DATE 9/13/01

SIGNATURE OF ATTORNEY OF RECORD Jeffrey R. Smith

J.R. Smith

Receipt # 74956 P#150